Supreme Court, U.S.
FILED

NO. 931441 MAR 15 1994

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

RICHARD M. WALSH,

PETITIONER,

v.

STATE OF DELAWARE,
MICHAEL N. CASTLE AND THE
DEPARTMENT OF MILITARY
AFFAIRS,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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85 pp

QUESTIONS PRESENTED

1. Whether this Court's decision in Patsy v. Board of Regents, 457 U.S. 496 (1982) can be properly cited as the basis to preclude exhaustion as a requirement regarding remedies in the Federal administrative appeals system provided by the Army Board for Correction of Military Records (ABCMR)?

2. Whether a willful age discrimination cause of action filed within three years from the date the cause of action accrued is time barred when the statute of limitations specified in 29 U.S.C. 626 (e)(1) prior to its 21 November 1991 amendment and 29 U.S.C. 255 (a) is applicable?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

NO._____

RICHARD M. WALSH,

Petitioner,

v.

THE STATE OF DELAWARE,
MICHAEL N. CASTLE AND THE
DEPARTMENT OF MILITARY AFFAIRS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

Petitioner, Richard M. Walsh, respectfully requests that a writ of certiorari issue to review the Judgment Order of the United States Court of Appeals for the Third Circuit

OPINIONS BELOW

The Order of the United States Court of

Appeals for the Third Circuit without opinion dated 19 November 1993 affirming the Judgment of the District Court entered 6 May 1993 (dated 5 May 93) appears in Appendix A.

The unreported Opinion of the United States District Court, District of Delaware, dated 5 May 1993 denying Plaintiff's Motion for Reargument appears in Appendix B.

The unreported Opinion of the United States District Court, District of Delaware, dated 30 December 1992 granting Defendants' Motion to Dismiss appears in Appendix C.

The Order of the United States Court of Appeals for the Third Circuit dated 16 December 1993 denying Petitioner's Motion for Rehearing and Suggestion for Rehearing En Banc Appears in Appendix D.

STATEMENT OF JURISDICTION

The Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the District Court's denial of

Plaintiff's Motion for Reargument and dismissal of the case was entered on 19 November 1993.

Petitioner's subsequent Motion for Rehearing and Suggestion for Rehearing En Banc was denied by the United States Court of Appeals for the Third Circuit on 16 December 1993.

The jurisdiction of this Court is invoked under 28 U.S.C. sec. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Age Discrimination in Employment Act of 1967, 29 U.S.C. sec. 626(e)(1) prior to 21 November 1991 amendment reads:

"Sections 6 and 10 of the Portal-to-Portal Act of 1947 (29 USCS sections 255 and 259) shall apply to actions under this Act."

The Portal-to-Portal Act of 1947, 29 U.S.C. 255(a) reads:

"if the cause of action accrues on or after the date of the enactment of this Act (May 14, 1947)- may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;"

STATEMENT OF THE CASE

1. On 22 May 1992, Mr. Walsh filed suit in the United States District Court, District of Delaware, well within the two years after receiving notification on 3 December 1990 from the Department of the Army, to whom the Delaware Department of Justice had initially directed Walsh for relief in this matter, that Mr. Walsh had "exhausted his opportunity for relief within the Army's administrative appeals system" and that his

"only recourse now is a Federal Court of competent jurisdiction."

a. Mr. Walsh filed pro se when he could find no competent attorney in the small state of Delaware who did not claim conflict of interest, too busy or lack of expertise in military law in this case, apparently perceived to be very politically sensitive. When such an attorney was finally found in Pennsylvania, he later had to withdraw unexpectedly when a job was offered and accepted in the U.S. Department of Justice.

2. In his suit, Walsh alleged that:

a. The Adjutant General/Delaware National Guard (DNG), a cabinet appointee reporting directly to the Governor, manipulated the DNG general officer selection and promotion process in gross violation of statutes and regulations thereby denying Walsh promotion to a general

officer position for which official records showed him to have been by a wide margin "best qualified", as required by regulations; thus, absent promotion, causing Walsh to be separated nine years prematurely from both the Delaware and the United States Army National Guards in which he held dual memberships. The Adjutant General/DNG then immediately certified his blatantly unqualified crony to the National Guard Bureau as being qualified for both promotion to the general officer position he had illegally denied Walsh and the required Federal Recognition in the Army National Guard of the United States (ARNGUS);

b. The Governor of Delaware, also Commander-in-Chief/DNG, in order to cover-up the wrongdoing as well as his own inaction having had prior knowledge of it and thereby preclude serious political embarrassment, knowingly and maliciously contrived and

disseminated false information in order to justify denying Walsh's direct appeal to the Governor for his immediate reinstatement in the DNG in the general officer position his Adjutant General's unqualified crony had been forced to vacate when the National Guard Bureau officially notified the State by letter not only denying the required Federal Recognition in the U.S. Army National Guard for the promotion of the Adjutant General's unqualified crony, but also finding him "unacceptable for retention in the Army National Guard in accordance with regulations"; and,

c. The above Governor's Lt. Governor and immediate successor as Governor and CINC/DNG continued the cover-up begun by his predecessor until confronted with a "Blue Book" documenting detailed evidence of the wrong doing and cover-up that the "new" Governor could not refute after its

extensive review, corroboration and subsequent validation by both the Governor's own legal staff and independently by an outside attorney-friend of both Governors.

(1) Realizing his own involvement in the cover-up and the potential for serious political embarrassment, the "new" Governor then deliberately delayed advising Walsh of the results of the "Blue Book" review until just two weeks before Walsh's 59th birthday when the reasonable expectation was raised that, because of the proven wrongdoing, there would be changes in the DNG, including Walsh's reinstatement, after the "new" Governor's expected reelection six weeks hence. The Governor was reelected and the resignation of his Adjutant General, who had wrongfully manipulated the regulated selection process and been carried over from the previous Governor's administration, was announced immediately after the election.

(2) Walsh however, was subsequently notified through the Governor's newly appointed Adjutant General that regulations prohibit promotion of officers to General Officer rank "at age 59 years plus" and then falsely assured that every avenue available had been exhausted in an effort to reinstate Walsh and that "there is nothing further that can, nor will, be done" --- while knowing full well the latter to have been a blatant and subsequently proven lie to preclude the political embarrassment that would have otherwise accrued to the Governor when the evidence of wrongdoing and cover-up was finally exposed during the Federal Recognition hearing that would have been necessary for Walsh's reinstatement; thus leaving only a deliberately crafted case of willful age discrimination in its wake.

3. On 28 September 1992, the Delaware Department of Justice representing the

Defendants moved to dismiss, alleging that the suit was barred pursuant to Fed. R. Civ. P. 12(b) (6).

4. On 30 December 1992, the District Court granted the State's motion to dismiss, finding that none of Walsh's first five of six causes of action accrued on or after 22 May 1990 and were therefore time barred based on 2 year statute of limitations under Del. Code. Ann., title 10, section 8119; and finding that Walsh's sixth and last cause of action accrued on 23 May 1989 and was therefore also time barred based on a 90 day statute of limitations under 29 U.S.C. 621 et al.

5. On 11 January 1993, Walsh moved for reargument respectfully pointing out as follows:

a. that the two year statute of limitations applied by the District Court to Walsh's first five causes of action was

tolled until 3 December 1990 when Walsh was officially notified that he "has exhausted his opportunity for relief within the Army's administrative appeals system" and advised that his "only recourse now is in a Federal Court of competent jurisdiction"; and,

b. regarding Walsh's sixth cause of action, that the applicable statute of limitations in effect prior to amendment 21 Nov 91, as reflected in EEOC'S 31 January 90 letter to Walsh, was two years after the cause of action, or three years if the violation was willful. (29U.S.C.626 (prior to 21 November 1991 Amendment), 29U.S.C.255).

6. On 5 May 1993, the District Court denied Walsh's Motion for Reargument. (Pertinent details at para. 7 below).

7. On 27 May 1993, Walsh filed a Notice of Appeal and on 7 August 1993 an "Informal Brief" to the United States Court of Appeals

for the Third Circuit. Pursuant to the "Informal Brief" format provided by the Court of Appeals, Walsh answered the following two questions:

a. Did the District Court incorrectly decide the facts of your case? YES. If so, what facts?

(1) Regarding Walsh's first five of six alleged causes of action: The fact that the two year statute of limitations applicable to Walsh's first five civil rights causes of action was tolled until he exhausted his administrative appeals was incorrectly decided by the District Court to be the opposite.

(a) The District Court's rationale, that "Plaintiff (Walsh) is not required to exhaust state administrative remedies prior to initiating a civil rights suit in federal court", which the Court supported by citing Patsy v. Board of

Regents, 457U.S.496 (1982) relating exclusively to state administrative remedies (App. B-7), is apparently based on the Court's mistake of fact that the Army's administrative appeals system (ABCMR: Army Board for Correction of Military Records) which was officially exhausted in the present case on 3 December 1990, is actually a Federal, not State, appeals system having the potential to provide a fully adequate remedy in the present case in accordance with the established position of the Third Circuit Court of Appeals on the matter. (Para. 9.b. below).

(2) Regarding Walsh's sixth cause of action: The District Court first found correctly that Walsh's willful age discrimination cause of action accrued on 23 May 1989 and that Walsh's Complaint had been filed on 22 May 1992; however, when the Court applied the correct three year statute

of limitations, instead of the previously incorrect 90 days, later agreed to have been an error of law committed by the Court, to the time period defined by those two dates, the Court incorrectly concluded that Walsh's willful age discrimination cause of action was still time barred. (App. B-2,9).

b. Did the District Court apply the wrong law (either cases or statutes)? YES.

(1) Regarding the alleged misapplication (at para. 7.a.(1) above) of Patsy v. Board of Regents, 457 U.S. 496 (1982), the applicable cases would be Karr v. Carper, United States District Court, District of Delaware, CA88-466 MMS, Unreported Opinion (31 March 1993); Penagaricano v. Llenza, 747 F.2d55,57 (1st Cir. 1984); and Williams v. Wilson, 762 F. 2d 357, 360n.6 (4th Cir. 1985).

8. On 19 November 1993, the United States Court of Appeals for the Third Circuit by

Judgment Order affirmed the District Court's Judgment entered on 6 (5) May 1993. The Court of Appeals issued no opinion with its Judgment Order. (App. A).

9. On 3 December 1993, Walsh filed a Motion for Rehearing with Suggestion for Rehearing En Banc which is reproduced in Appendix E. In that petition, Walsh respectfully pointed out and discussed the following at para.2.b & c. beginning on page E-4:

a. The common misapprehension to think of the "National Guard" as being strictly a State organization when in fact it has an "unusual 'hybrid' status as an agency with both Federal and State characteristics", Johnson v. Orr, 780 F. 2d 386, 388 (3rd Cir. 1986);

b. The critical importance of either the presence or absence of State control --- depending on whether or not the State Guard

member is also a full-time Guard employee holding a civilian technician position controlled by the State and requiring continued State Guard membership, or a Guard member employed full-time in the Active Guard/Reserve (AGR) program controlled by the State, or simply a part-time citizen soldier with a Federally Recognized dual membership in the Army (or Air) National Guard of the United States (ARNGUS) which the vast majority of Guard members are and Walsh was in the present case --- in making the correct determination in each case as to whether or not there is the "potential adequacy of that remedy in the particular case" necessary to require exhaustion under the approach taken by the United States Court of Appeals for the Third Circuit "which favors exhaustion but does not require it where the administrative remedy would be inadequate," Jorden v. National

Guard Bureau, 799F.2d 99, 102 n.5. (3rd Cir 1986); and,

c. The critical difference between the present case and both the Jorden case cited immediately above, and Karr v. Carper, United States District Court, District of Delaware, CA 88-466 MMS, Unreported Opinion (31 March 1993), because of the overriding characteristic of State control in Jorden (a full-time civilian technician) and in Karr (a full-time AGR employee) compared to its absence in the present case (Walsh part-time citizen soldier with Federal Recognition and dual membership in the Army National Guard of the United States).

10. On 16 December 1993, the United States Court of Appeals for the Third Circuit denied Walsh's Motion for Rehearing.

REASONS FOR GRANTING THE WRIT

1. This case presents an opportunity for this Court to resolve a conflict, regarding

the "Doctrine of Exhaustion of Remedies," between the exhaustion decision of the United States Court of Appeals for the Third Circuit in the present case and decisions on the same matter in other Circuits, as well as previous exhaustion decisions and current exhaustion policy within the Third Circuit itself; and if allowed to stand, the decision in the present case will also result in a conflict between it and another recent exhaustion decision in the United States District Court for the District of Delaware. Finally, the decision petitioned herein for review decided a Federal question in a way that conflicts with an applicable decision of this Court. Review and resolution by this Court is necessary in order to secure and assure uniformity of decisions and is therefore of general importance throughout our entire justice system and to the public it serves.

a. The United States Court of Appeals for the Third Circuit, by affirming without opinion the 5 May 93 decision of the District Court in the present case, held that the 2 year statute of limitations applicable to Walsh's first five of six civil rights causes of action, none of which accrued on or after 22 May 90, was not tolled until Walsh exhausted his Federal administrative appeals on 3 Dec. 90 based on the following from the District Court's 5 May 93 Opinion reproduced as Appendix B : " generally a plaintiff is not required to exhaust State remedies prior to initiating a civil rights suit in federal court. Patsy v. Board of Regents, 457 U.S. 496 (1982)." (App. B-7).

(1) Since the administrative appeals system was Federal and not State, Walsh identified the above basis and citation as errors of apprehension and of law,

respectively, both in his initial Informal Brief, as reported above in "Statement of the Case," para. 7.a.(1) and 7.b.(1), as well as in his Motion for Rehearing, reproduced as Appendix E, at page E-4, Para. 2.b.

(2) However, aside from the confusion caused by those suggested errors of apprehension and of law, the conflicting core decision of the District Court affirmed by the Court of Appeals remains that Walsh was not required to exhaust his Federal administrative appeals before filing in Federal Court and is therefore time barred.

b. Following is just a sample of the conflicts with exhaustion decisions in other Circuits if the decision in the present case is left intact:

(1) First Circuit; Navas v. Vales, 752 F.2d 765, 766, 770, 771 (1st Cir. 1985). The Court of Appeals held that the claim

that the Selective Retention Board violated military regulations was not justiciable where former officer had not availed himself of review mechanism provided by the Army Board Correction of Military Records (ABCMR).

(a) "Navas also claims that because the ABCMR cannot give him complete relief, he should not be required to appeal to that Board before pursuing judicial remedies."

(b) The Court responded that "the ABCMR cannot compel the Puerto Rico National Guard to reinstate Navas, but it can correct Navas' record to show that he is eligible for reinstatement in the PRNG. The ABCMR is also empowered to provide Navas with substantial relief by reinstating him in active federal reserve status and ordering the payment of all pay an allowances lost as a consequence of a wrongful separation."

Penagaricano v. Llenza, 747 F.2d 55,57 (1st Cir. 1984).

(c) "Our decision today is consonant with the general rule that 'military personnel with grievances against the military establishment or its personnel must exhaust the administrative remedies provided by the military service before seeking relief in civilian courts.'" Penagaricano v. Llenza, 747 F.2d 55,61 (1st Cir 1984).

(d) "In this case (Navas) there is no reason to make an exception to the general rule mandating exhaustion."

(2) Fourth Circuit : Williams v. Wilson, 762 F.2d 357, 358, 360 n.6 (4th Cir. 1985). The Court of Appeals "held that the Federal claim that the National Guard violated its own regulation when it empanelled an improper selective retention board was a nonjusticiable military

controversy where the member failed to exhaust his intraservice administrative remedies."

(a) "The proper action for the District Court would have been to dismiss Williams' claim without prejudice as premature." (n.6).

(b) n.6: "While the ABCMR lacks authority to order the West Virginia Army National Guard to reinstate Williams were it to find in his favor, it would have the power to correct Williams' federal records to show that his federal recognition has not been withdrawn, reinstate Williams in a comparable active federal reserve status, restore his pay and order compensatory back pay". Penagaricano v. Llenza, 747 F.2d. 55,57, (1st Cir 1984); Navas v. Vales, 752 F.2d 765,770 (1st Cir 1985).

(3) Fifth Circuit : Hodges v. Callaway, 499 F.2d 417,420 (5th Cir. 1974).

The Court of Appeals "held that serviceman who claimed that his discharge for convenience of the government was in fact designed as punishment and that the Army did not comply with established procedures was required to exhaust administrative remedies and failure to do so precluded district court from entering suit."

(a) Beginning with McCurdy v. Zuckert, 359 F.2d 491, (5th Cir 1966), "This Court has firmly adhered to the rule that a plaintiff challenging an administrative military discharge will find the doors of the federal courthouse closed pending exhaustion of available administrative remedies." Except that "only those remedies which provide a real opportunity for adequate relief need be exhausted."

c. Following is an example wherein the decision of the United States Court of Appeals for the Third Circuit in the present

case is in direct conflict with the current exhaustion policy within its own Third Circuit:

(1) Third Circuit : Jorden v. National Guard Bureau, 799 F.2d 99, 102 n.5. (3rd Cir. 1986). While the Court of Appeals decided this case on other issues, it also corrected the lower Court's erroneous conclusion, "that Jorden's failure to exhaust administrative remedies was an additional basis for dismissal," by defining the current exhaustion policy in the Third Circuit as follows, which is consistent and uniform with other Circuits as sampled above:

(a) " --this Court has not adopted a per se exhaustion requirement for military personnel. - - Rather, we said, exhaustion depends on the potential adequacy of that remedy in the particular case." Our approach "favors exhaustion but does not

require it where the administrative remedy would be inadequate."

(b) In Jorden, at 102n.5., the Court of Appeals went on to explain that the AFBCMR could not afford Jorden satisfactory relief because of the overriding characteristic of State control in that case, as had been respectfully pointed out to the Court of Appeals in contrast to the present case as reported above in "Statement of the Case," para.9. b.&c., which is consistent and uniform with the current Third Circuit exhaustion policy and those found in other Circuits but not followed in making the decision in the present case.

(c) Conversely, had Jorden not been employed by the State Guard in a full-time civilian technician position where continuation of that civilian employment is directly dependent on Jorden's continued military membership in the State Guard, thus

eliminating the "overriding characteristic of State control," satisfactory relief could have been afforded by the AFBCMR in that case and exhaustion would have then been required of Jorden by the current exhaustion policy of the Third Circuit just as it was in Navas and Williams, respectively, at para. 1.b.(1) and (2) above and as it should be in the present case as well all on a consistent and uniform basis.

(d) Following is an example wherein the decision of the United States Court of Appeals for the Third Circuit in the present case is in direct conflict with a recent exhaustion decision in a Third Circuit District court:

(1) Third Circuit, District Court for the District of Delaware : Karr v. Carper, United States District Court, District of Delaware, CA 88-466 MMS, Unreported Opinion (31 March 1993). While

the District Court decided this case on other issues, it first ruled on the matter of exhaustion where Defendants contended "that it is inappropriate for the Court to render an opinion on the merits of this case because Plaintiff has failed to exhaust his administrative remedies". Specifically, Defendants, represented by the Delaware Department of Justice (DOJ) as in the present case, "assert Plaintiff should have sought review of his separation from the Army Board for Correction of Military Records (ABCMR)."

[Note: Defendants' assertion above in Karr is a defense strategy directly opposite from that employed by the very same Delaware DOJ representing Defendants in the present case in which there is no "overriding characteristic of State control" which is directly opposite from the Karr case. The Defendants' assertion that exhaustion should

have been required of Karr was overruled and reversed by the District Court because of the "overriding characteristic of State Control" present in Karr; conversely, therefore, Defendants' opposite assertion in the present case, that exhaustion should not be required of Walsh, should also be overruled and reversed for the opposite reason, because there is no "overriding characteristic of State control present in Walsh.]

(a) The District Court ruled that "Karr's failure to exhaust his administrative remedies by petitioning the ABCMR does not impinge upon the Court's obligation to render a decision following a trial."

(b) The District Court cited Jorden v. National Guard Bureau, 799 F.2d 99, 102 n.5. (3rd Cir. 1986) and explained that the approach of the Third Circuit Court

of Appeals regarding exhaustion "focused on the adequacy of the remedy the administrative process could potentially supply" pointing out that, as in Jorden, the ABCMR could not provide an adequate remedy to Karr because of the overriding characteristic of State control in the Karr case.

(c) The District Court further explained that "the potential remedy here is an order directing Delaware State National Guard personnel to reevaluate Karr's separation" from his Army Guard/Reserve (AGR) tour (full-time active duty employment under state control) where "Karr in his role as AGR member was under State, not Federal control" and "the ABCMR, as a Federal board does not possess the power to issue such an order."

[Note: Conversely, the present case involves a part-time citizen soldier like

the vast majority of Guard members which does not carry with it the "overriding characteristic of State control" present in cases like Karr and Jorden, that precludes adequate A(F)BCMR remedies in those cases; therefore the ABCMR in the present case, as in Navas and Williams above at para. 1. b. (1) and (2), respectively, can provide the adequate remedies necessary under the generally consistent and uniform exhaustion policies that currently exist within the various Circuits, including the Third Circuit, in order to require exhaustion.]

e. Following is an example wherein the United States Court of Appeals for the Third Circuit in the present case has decided a Federal question in a way that conflicts with an applicable decision of this Court:

(1) "In Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51, 58 S. Ct. 459, 463, 82 L. Ed. 638 (1938), the

Supreme Court stated that it is a 'long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" First Jersey Securities, Inc. v. Bergen, 605 F. 2d 690, 695 (3rd Cir. 1979).

2. The present case also presents an opportunity for this Court to correct a serious error of law arising when 29 U.S.C. 626 (e) prior to its 21 Nov 91 amendment was found to time bar a willful age discrimination cause of action even though the undisputed facts and arithmetic clearly show that the Complaint was timely filed within the appropriate three year statute of limitations used in the District Court's own calculations of the time period between the date of filing and the date the cause of action accrued, neither of which was in

dispute by any party. Review and resolution of this problem by this Court is of general importance to all who rely on the fairness and integrity of our justice system which carries its importance well beyond just the parties immediately involved in the present case and therefore underscores the need for resolution in order to warrant and maintain the public trust.

a. The District Court's 5 May 93 Opinion affirmed by the United States Court of Appeals for the Third Circuit without opinion and reproduced as Appendix B cites as its first "fact" that Walsh filed the Complaint on 22 May 1992 and confirmed in its next to last "Discussion" paragraph that Walsh's willful age discrimination cause of action accrued on 23 May 1989. The District Court also stated that the Court Committed an error of law by previously imposing a 90 day statute of limitations and agreed that

the applicable statute of limitations was two years after the cause of action accrues, or three years if the violation was willful. The Court then Applied the three year statute of limitations for Walsh's willful age discrimination cause of action to the period between 23 May 89 and 22 May 92 and somehow concluded that Walsh's willful age discrimination cause of action "would still be time barred." (App. B-2, 9).

(1) Walsh identified the details of the above suggested error, which if corrected would cause the Courts to reach a different result, to the Court of Appeals both in his initial "Informal Brief", as reported above in "Statement of the Case" para. 7. a.(2), and also in his Motion for Rehearing, reproduced as Appendix E, at page E-15, para. 3.

CONCLUSION

For the foreg ing reasons, Petitioner

respectfully requests that this Court grant the petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Richard M. Walsh

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Dated: 9 March 1994

APPENDIX

APPENDIX A-1

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-7421

RICHARD M. WALSH,
Appellant

v.

STATE OF DELAWARE; MICHAEL N. CASTLE, Governor of the State of Delaware, ex officio and in personam his successors and assigns;
THE DEPARTMENT OF MILITARY AFFAIRS

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 92-00298)
District Judge: Hon. Joseph J. Farnan

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 12, 1993

Before: SLOVITER, Chief Judge
COWEN and LEWIS, Circuit Judges

JUDGMENT ORDER

After consideration of all

contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court entered May 6, 1993 be and is hereby affirmed. Costs taxed against appellant.

By the Court,

Attest:

(s) P. DOUGLAS SISK
P. Douglas Sisk, Clerk

(s)D.K. SLOVITER
Chief Judge

Dated: November 19 1993

APPENDIX B-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	CIVIL ACTION NO:
v.	:	92-298-JJF
	:	
STATE OF DELAWARE,	:	
MICHAEL N. CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

Richard M. Walsh. Pro se Plaintiff.

John J. Polk, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorney for Defendants.

MEMORANDUM OPINION

May 5, 1993

Wilmington, Delaware

(s) JOSEPH J. FARNAN,Jr.
FARNAN, District Judge.

I. INTRODUCTION

The Plaintiff, Richard M. Walsh, has moved the Court pursuant to Local Rule 7.1.4 to reconsider the Court's Order granting Defendant's Motion to Dismiss. (D.I. 19). The Court will deny Plaintiff's Motion for Reconsideration because the Plaintiff has failed to demonstrate that the Court would have reached a different result had it been aware of the alleged errors.

II. FACTS

On May 22, 1992, Plaintiff Walsh filed a civil rights complaint against the State of Delaware, Michael N. Castle, and Delaware's Department of Military Affairs seeking damages and injunctive relief pursuant to 29 U.S.C. 621 et seq., 42 U.S.C. section 1983, 42 U.S.C. sections 1985 (1), (2), (3), and 42 U.S.C. section 1986. (Complaint, at section II). The Complaint alleged six causes of action. Counts One

and Two alleged that Plaintiff's employment in the Delaware National Guard was unlawfully terminated prematurely in violation of statute and public policy. Count Three alleged that Plaintiff's termination was in willful violation of Plaintiff's right to substantive and procedural due process. Counts Four and Five alleged that Plaintiff's reinstatement was unlawfully denied in willful violation of statutes, public policy, and substantive and procedural due process. Finally, Count Six alleged that Plaintiff's reinstatement was denied in willful violation of his right not be discriminated against on the basis of age as provided in 29 U.S.C. Section 621 et seq.

Defendants moved the Court to dismiss the Complaint contending that each of the claims was barred by the applicable statute of limitations. The Court granted Defendants' Motion to Dismiss holding that

all of Plaintiff's claims were time-barred. First, the Court found that Plaintiff's first three causes of action, grounded in the alleged unlawful and premature termination of Plaintiff's employment with the National Guard, accrued on August 21, 1982. Therefore, applying a two-year statute of limitations, the Court concluded that causes of action one, two, and three were time barred.

Furthermore, the Court found that Plaintiff's fourth and fifth causes of action, which were grounded in the National Guard's refusal to reinstate Plaintiff, accrued on May 23, 1989, the date on which Adjutant General Episcopo informed Plaintiff that the Delaware Army National Guard would not take further action on his request for reinstatement. Therefore, the Court concluded that these causes of action were likewise barred by the applicable two-year statute of limitations.

Finally, the Court concluded that Plaintiff's allegation that the Delaware Army National Guard discriminated against him on the basis of age in denying his request for reinstatement was barred by the statute of limitations found in 29 U.S.C. 626(e), which is 90 days from receipt of notice that EEOC proceedings are terminated. The EEOC mailed such notice to Plaintiff on January 31, 1990.

On January 11, 1993, Plaintiff filed the Motion for Reargument presently before the Court.

III. DISCUSSION

Although Local Rule 7.1.4 permits a party to file a motion for reargument, the courts in the District of Delaware have consistently held that motions for reargument ought to be granted sparingly. "It should be granted in circumstances where the Court has patently misunderstood a party or made an error not of reasoning but of

apprehension." Karr v. Castle, 768 F. Supp. 1087, 1090 (D. Del. 1991). Thus, the Court will grant Plaintiff's motion only if the Court is convinced that (1) the Court made an error of law or mistake of fact, and (2) if aware of the error or mistake, the Court would have reached a different result.

Plaintiff contends that the Court erred in three respects. First, Plaintiff disputes the Court's finding that Plaintiff's first five causes of action accrued on or before May 23, 1989. Plaintiff contends that the first five causes of action accrued on December 3, 1990, at which time "Federal officials designated by the Delaware Department of Justice to provide a 'proper' hearing and due process, informed Plaintiff, thru [sic] Senator Biden, that: (1) 'He has exhausted his opportunity for relief within the Army's administrative appeals system," and (2) "His only recourse now is in a Federal Court of

competent jurisdiction." (D.I. 19, Paragraph 1).

The Plaintiff has not persuaded the Court that the Court erred as a matter of law in finding that Plaintiff's causes of action accrued on or before May 23, 1989 as opposed to December 3, 1990. Plaintiff has pointed to no "error of apprehension," to warrant reconsideration of the Court's conclusion. By highlighting the December 3, 1990 letter, Plaintiff attempts to communicate to the Court that the statute of limitations on his civil rights causes of action was tolled until he exhausted his administrative appeals. But, generally a plaintiff is not required to exhaust state administrative remedies prior to initiating a civil rights suit in federal court. Patsy v. Board of Regents, 457 U.S. 496 (1982). Plaintiff has cited no authority to persuade the Court that the National Guard's appeals system impacted in any way Plaintiff's time

for filing his civil rights complaint in federal court. Absent a showing that the Court committed an error of law, or a mistake of fact, reconsideration of the Court's order dismissing Plaintiff's first five causes of action as barred by the statute of limitations is not warranted.

Plaintiff next alleges that the Court erred in holding that his sixth cause of action was barred by the relevant statute of limitations. As the Plaintiff notes, the Court applied the statute of limitations found in 29 U.S.C. Section 626(e) as amended on November 15, 1991. Plaintiff argues that the applicable statute of limitations would be that statute of limitations in effect prior the 1991 amendments. According to the Plaintiff, the statute of limitations for age discrimination claims brought pursuant to 29 U.S.C. Section 621 et seq. prior to November 15, 1991, was two years after the cause of action accrues, or three years if

the violation was willful.

The Court agrees that the applicable statute of limitations is that found in 29 U.S.C. 626(e) prior to the 1991 amendments, i.e. two years after the cause of action accrues, or three years if the violation was willful. Although the Plaintiff has demonstrated that the Court committed an error of law in applying the statute of limitations in effect after November 15, 1991, the Plaintiff has not demonstrated that the Court would have reached a different result had the Court used the two or three year statute of limitations. As noted above, the Court found that Plaintiff's causes of action based on the National Guard's failure to reinstate him at the latest accrued on May 23, 1989. Thus, even if the Court applied the three year statute of limitations, as 29 U.S.C. 626(e) provided for prior to November 15, 1991, the cause of action would still be

time barred. Because Plaintiff is unable to show that the Court would have reached a different result, reconsideration of the Court's order dismissing Plaintiff's age discrimination cause of action must be denied.

Lastly, Plaintiff alleges that the Court erred in concluding that Plaintiff was required to show some racial animus to establish a claim under 42 U.S.C. Section 1985. Plaintiff cites the case of U.S. ex rel. Karr v. Castle, 746 F.Supp 1231 (D. Del. 1990) to support his contention that his civil rights claims are

> **based on alleged specific constitutional deprivations,** e.g. involving property and liberty interests affected by the false reason given for Plaintiff's termination, denial of a pretermination hearing, and deliberate and arbitrary abuse of government power tainted by improper motive, **which are themselves sufficient without any racial animus to establish Plaintiff's claim under 42 U.S.C. sec. 1985.**

(D.I. 19, at Paragraph 3). The Court finds

it unnecessary to discuss this assignment of error because, as the Court has determined previously and reiterated above, Plaintiff's claims under 42 U.S.C. Section 1985 are barred by the statute of limitations. Even if the Court erred in holding that Plaintiff was required to show racial animus, such an error did not impact the Court's decision to dismiss the Complaint. Since the Plaintiff has not shown that the Court would have reached a different result had it been aware of the alleged error, reconsideration of the Court's decision to dismiss Plaintiff's Section 1985 claim is not warranted.

IV. CONCLUSION

Plaintiff has failed to convince the Court that the Court committed an error of law or mistake of fact that, if corrected, would have caused the Court to reach a different result. Accordingly, the Court will deny Plaintiff's Motion for Reargument. An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	Civil Action
	:	No. 92-298-JJF
v.	:	
	:	
STATE OF DELAWARE,	:	
MICHAEL N CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

O R D E R

At Wilmington this 5 day of May, 1993, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that Plaintiff's Motion for Reargument is DENIED.

(s) Joseph J. Farnan, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX C-1

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	Civil Action No.
	:	92-298-JJF
v.	:	
	:	
STATE OF DELAWARE,	:	
MICHAEL N CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

Richard M. Walsh. Pro Se Plaintiff.

John J. Polk, Deputy Attorney General, Department of Justice, Wilmington, Delaware. Attorneys for Defendant.

MEMORANDUM OPINION

December 30, 1992

Wilmington, Delaware

(s) Joseph J. Farnan, Jr.
FARNAN, District Judge.

The Court has before it Defendants' Motion to Dismiss filed pursuant to Fed. R. Civ. P. 12(b)(6). (D.I. 6). On May 22, 1992, Plaintiff Walsh filed a civil rights complaint seeking damages and injunctive relief pursuant to 29 U.S.C. Section 621, 42 U.S.C. Section 1983, 42 U.S.C. Section 1985 (1), (2), (3), and 42 U.S.C. Section 1986. (Complaint, Section II). Plaintiff Walsh alleges that "his employment in the Delaware National Guard was unlawfully prematurely terminated" by Defendants' failure to promote him to a general officer position. (Complaint, Section IV, at Paragraphs 1-3). He alleges that he was not promoted to Deputy Commander because of his "lawful and conscientious execution of his duties in the service of the Delaware Army National Guard." (Complaint, Section IV, at paragraph 2). He further alleges that the decision not to

promote him, and the denial of his request for reinstatement, violated his constitutional right to procedural and substantive due process, as guaranteed by the Fifth and Fourteenth Amendments. (Complaint, Section IV, at paragraphs 3, 5). Finally, Plaintiff Walsh alleges that the Delaware National Guard's denial of his request for reinstatement violated his right not to be discriminated against on the basis of age. (Complaint, Section IV, at 6).

Defendants' allege that Plaintiff's Civil rights claims filed pursuant to Sections 1983, 1985, 1986 are untimely. Although there is no federal statute of limitations for causes of action brought pursuant to Sections 1983, 1985, and 1986, the Supreme Court has held that the applicable limitations period is the statute of limitations which governs the most analogous cause of action under state law. Wilson v. Garcia, 471 U.S. 261, 276 (1985);

see also Henig v. Odorioso, 385 F.2d 491 (3rd Cir.), cert. denied, 390 U.S. 1016, reh'g denied, 391 U.S. 929 (1969). In Wilson, the Supreme Court held that Section 1983 actions are to be characterized as personal injury actions for statute of limitations purposes. Id. The Court extended Wilson in Owens v. Okure, 109 S.Ct. 573, 574 (1989), where it held that if a state has more than one personal injury statute of limitations, "the residual or general personal injury statute of limitations" should be applied. See Christmas v. Marson, No. 89-5498, slip. op. (3d Cir. January 3, 1990) (applying New Jersey's two-year general personal injury statute of limitations in an employment discrimination suit filed pursuant to Section 1983); accord Black Whale, Inc. v. Borough of Beach Haven, 1990 U.S. Dist. LEXIS 2504, at *5-6 (D.N.J. February 9, 1990).

In accordance with the Supreme Court and Third Circuit decisions, the Court concludes that the most analogous Delaware statute is Delaware's general limitations statute, Del. Code Ann., tit. 10, Section 8119, which provides a two year statute of limitations for personal injury actions. Therefore, the Court must determine whether Plaintiff's complaint sets forth any cause of action which accrued within the limitations period -- on or after May 22, 1990.

Plaintiff's first three causes of action allege injury from Defendants' unlawful and premature termination of his employment in the Delaware Army National Guard. On August 21, 1982, Plaintiff was mandatorily released from the Delaware Army National Guard. Plaintiff alleges he was forced to retire because the National Guard wrongfully denied him a promotion to a Deputy Commander. It is clear from these

facts that Plaintiff's injury, if any, accrued on August 21, 1982, the day upon which he was forced to retire. Therefore, to the extent that Plaintiff alleges claims under Sections 1983, 1985, 1986, these claims are time barred. Accordingly, each must be dismissed.

Plaintiff's third and fourth causes of action allege statutory and constitutional violations arising out of the National Guard's denial of his request for reinstatement. In an attempt to avoid the statute of limitations problem, Plaintiff characterizes these causes of action as "continuing violations" of his rights. The Court does not agree. On May 23, 1989, Adjutant General Episcopo informed Plaintiff that the Delaware Army National Guard would take no further action on his request for reinstatement. Thus, the Court finds that Plaintiff's third and fourth causes of action, challenging the denial of his

reinstatement, accrued on May 23, 1989, well outside the allowable limitations period. Therefore, to the extent that Plaintiff's causes of action state claims under Sections 1983, 1985, 1986, they are also time barred. Accordingly, Plaintiff's fourth and fifth causes of action must be dismissed.

Plaintiff's last cause of action alleges that the Delaware Army National Guard discriminated against him on the basis of age, in denying his request for reinstatement. As discussed above, any cause of action premised on the facts alleged accrued on May 23, 1989, at which time the Delaware Army National Guard informed Plaintiff that its denial was final and would not be reconsidered.

The applicable statute of limitations under 29 U.S.C. 621 et al. is 90 days from receipt of notice that EEOC proceedings are terminated. The EEOC mailed such a notice to Plaintiff on January 31,

1990. (Plaintiff's Response in Opposition to Defendants' Motion to Dismiss, Ex. K). Plaintiff has not alleged that he did not receive this notice in due course. Thus, the Court must conclude that more than 90 days passed since Plaintiff's receipt of the notice. As with Plaintiff's other claims, the cause of action pursuant to Section 621 is time barred. Accordingly, it must also be dismissed.

Moreover, Plaintiff's claim under 42 U.S.C. Section 1985 is likewise without merit. "The United States Supreme Court has interpreted the language of Section 1985--permitting a cause of action for the deprivation of equal protection, privileges or immunities--to mean that 'there must be some racial or perhaps otherwise class-based invidiously discriminatory animus behind the conspirators' action.'" Pagano v. Hadley, 553 F. Supp. 171, 173 (D. Del. 1982) (quoting Griffin v. Breckenridge, 403 U.S.

88, 102 (1971)). Plaintiff has not alleged that defendants' actions were motivated by some class-based discrimination. The facts that Plaintiff alleges directly contradict a conclusion of such class-based discrimination. Plaintiff alleges facts to lead to a conclusion that he was not promoted, and thus forced to retire, because he attempted to right wrongs that he observed. Accordingly, Plaintiff's claim under Section 1985 must also be dismissed.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

RICHARD M. WALSH,	:	
	:	
Plaintiff,	:	
	:	Civil Action
	:	No. 92-298-JJF
v.	:	
	:	
STATE OF DELAWARE,	:	
MICHAEL N CASTLE, and	:	
THE DEPARTMENT OF MILITARY	:	
AFFAIRS,	:	
	:	
Defendants.	:	

ORDER

At Wilmington this 30 day of December, 1992, for the reasons set forth in the Memorandum Opinion issued this date,

IT IS HEREBY ORDERED that Defendants' Motion to Dismiss is GRANTED.

(s) Joseph J. Farnan, Jr.

UNITED STATES DISTRICT JUDGE

APPENDIX D-1

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7421

RICHARD M. WALSH

V.

STATE OF DELAWARE;MICHAEL N. CASTLE,
ex officio and in personam his successors
and assigns;
THE DEPARTMENT OF MILITARY AFFAIRS

SUR PETITION FOR REHEARING

Present: SLOVITER, Chief Judge, BECKER,
STAPLETON, MANSMANN, GREENBERG,
HUTCHINSON, SCIRICA, COWEN,
NYGAARD, ALITO, ROTH and LEWIS,
Circuit Judges

The petition for rehearing filed by Appellant Richard M. Walsh in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for

rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

(s)Dolores K. Sloviter
Chief Judge

Dated: Dec 16 1993

APPENDIX E-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

RICHARD M. WALSH,

Appellant,

v.

STATE OF DELAWARE, ET AL,

Appellees.

Appellant's Motion for Rehearing
Richard M. Walsh

No. 93-7421

Appeal From A Final Judgment
Of The United States District Court
For The District Of Delaware
C.A. No. 92-298

RICHARD M. WALSH
2209 Pennington Drive
Wilmington, DE 19810
(302) 475-3697

PRO SE

I. MOTION FOR REHEARING

Appellant respectfully moves for a rehearing in the sincere belief that, in affirming the judgment of the District Court filed on May 5, 1993, the Court, in its Judgment-Order entered in this Case No. 93-7421 on November 19, 1993, has overlooked and/or misapprehended one or more of the specific points of law and fact as discussed below; consequently, failing to maintain uniformity of decisions in this Court. A rehearing in banc is therefore suggested. Appellant further requests the Court's permission to amend this Brief if any clarification of the basis for the Judgment-Order would become available.

II. DISCUSSION

1. In the absence of a Memorandum Opinion or any other clarification as to the basis for the Court's November 19, 1993 Judgment-Order, it is assumed for the purpose of this

Brief that the Court's affirmation of the District Court's May 5, 1993 Judgment relies on its companion Memorandum Opinion issued by the District Court on that same date which will be used to guide Appellant's discussion below.

A. EXHAUSTION

2. The District Court, in its Memorandum Opinion issued May 5, 1993, stated on pages 3 & 4 that: (a) "Plaintiff (Appellant) disputes the Court's finding that Plaintiff's first five causes of action accrued on or before May 23, 1989. Plaintiff contends that the first five causes of action accrued on December 3, 1990 --"; (b) "Plaintiff has pointed to no 'error of apprehension,' to warrant reconsideration of the Court's conclusion"; and (c) "Plaintiff has cited no authority to persuade the Court that the National Guard's appeal system impacted in any way Plaintiff's time for filing his civil rights

complaint in federal court." Regarding the above:

a. Appellant (Plaintiff) erred in his initial wording and, in fact, does agree with the District Court's finding that the Appellant's first five causes of action actually did accrue on or before May 23, 1989; but contends, this time in the proper language of the Court, that the statute of limitations on Appellant's first five causes of action was tolled until he exhausted his Federal - -not State - - administrative appeals on December 3, 1990.

b. Appellant respectfully points to the following errors of apprehension and of law which, if corrected, would cause the Court to reach a different result: The District Court's Opinion states that "Plaintiff attempts to communicate to the Court that the statute of limitations on his civil rights causes of action was tolled until he exhausted his administrative

appeals. But generally a plaintiff is not required to exhaust state administrative remedies prior to initiating a civil rights suit in federal court." Thus, referring to the "administrative appeals" incorrectly as "state administrative remedies" which is clearly an error of apprehension on the part of the Court for the following reasons: Appellant has consistently stated that the Delaware Department of Justice had deferred to and directed Appellant to Federal officials in the Army's Federal administrative appeals system, namely, the Army Board for Correction of Military Records (ABCMR). The Del. DOJ's letter to Appellant further explained that "The charges concerning promotion and premature termination are not properly before this (State) Office because these matters are examined and approved by federal officials." Therefore, citing Patsy v. Board of Regents, which has no relevance to the present case,

is obviously an error of law based on the above error of apprehension since Patsy deals solely with State administrative remedies, not Federal.

(1) It is a very common misapprehension to think of the "National Guard" as being strictly a State organization, when in fact it has an "unusual 'hybrid' status as an agency with both federal and state characteristics." Johnson v. Orr, 780 F. 2nd 386, 388 (3rd Cir. 1986).

(2) "The National Guard is a component of the Militia of the various states. Members of such state systems may (with Federal Recognition) also become members of the Army or Air National Guard of the United States ['ARNGUS' or 'ANGUS']. A federal board for the correction of military records has the authority to correct federal aspects of a Guard member's military records." Karr v. Carper, No. 93-7410,

March 31, 1993 Opinion, C.A. 88-466 MMS, page 3 n. 2.

c. Appellant again respectfully points to an error of apprehension which, if corrected, would cause the Court to reach a different result: In the context of the District Court's May 5, 1993 Opinion in the present case, its reference to the "National Guard's Appeals system" equates it incorrectly to a State appeals system. As discussed above at 2.b., the Del. DOJ ruled that there was no State appeals system available in Appellant's case, only Federal, because it concerns promotion and premature termination. Therefore, The Third Circuit Court of Appeals is the authority to persuade the District Court that the Army's Federal administrative appeals system did in fact impact Plaintiff's time for filing his civil rights complaint in Federal Court by tolling the statute of limitations until Appellant had exhausted his Federal

administrative appeals on December 3, 1990.

(1) While The Third Circuit Court of Appeals has not adopted a per se exhaustion requirement for military personnel seeking redress in Federal Court, it did say that "exhaustion depends on the potential adequacy of that remedy in the particular case," and that the Court's approach "favors exhaustion but does not require it where the administrative remedy would be inadequate." Jorden v. National Guard Bureau, 799 F.2d 99, 102 n. 5 (3rd Cir. 1986).

(2) Because Appellant was a member in good standing of the Army National Guard of the United States (ARNGUS) with full Federal Recognition, the Army's Federal administrative appeals system (ABCMR) had the potential, regarding the matter involved in the present case, to supply a fully adequate administrative remedy consisting of either:

(a) Correction of Appellant's federal records, to show that his federal recognition has not been withdrawn and that he remains a member in good standing of the (ARNGUS), and reinstatement to State status with restoration of pay and compensatory back pay if recommended by the ABCMR to, and then ordered by the State: or

(b) Correction of Appellant's federal records, as above, and reinstatement in a comparable active federal reserve status with restoration of pay and compensatory back pay ordered directly by the ABCMR. Penagaricano v. Llenza, 747 F.2d. 55, 57 (1st Cir. 1984) and Williams v. Wilson, 762 F.2d. 357, 360 n. 6 (4th Cir. 1985).

(3) Therefore, Appellant's contention that his exhaustion of the Army's administrative appeals system (ABCMR), in the role assigned to that Federal agency by

the Congress, was required prior to filing a complaint in Federal Court is consistent with the position of The Third Circuit Court of Appeals as stated above at para. c.(1).

(4) It is important to understand that the Federal administrative remedies above at para. c.(2) were available to Appellant only because he held a dual military membership in the Army National Guard of the United States (ARNGUS) with full Federal Recognition; and were fully adequate only because Appellant was a military (part-time citizen soldier) only and did not also hold a full-time civilian technician job, or other State controlled position, in the State Guard, the latter being contingent upon the individual being retained as a military member of the State Guard.

(a) Thus, the critical difference between the present case and the Jorden case cited above at para. c.(1): In

addition to being a military member of the State Guard, Jorden was also employed as a full-time civilian technician. When Jorden was dismissed from his military position in the Pennsylvania Air National Guard, his civilian technician employment was automatically terminated because only military members of the State Guard are eligible for civilian technician employment.

(b) Therefore, since the AFBCMR, a Federal board, could not order Jorden's reinstatement in the State Guard, nor could it reinstate Jorden to his civilian technician position in any event, The Third Circuit Court of Appeals did not require exhaustion because, consistent with its position as stated above at para. c.(1), "the administrative remedy would be inadequate." Exactly opposite the circumstances in the present case, wherein the potential for administrative remedy was and continues to be fully adequate and,

therefore, exhaustion was required in the present case in accordance with the Court's clearly stated position at c. (1) above and to maintain uniformity of the Court's decisions. Jorden v. National Guard Bureau, 799 F.2d. 99, 102 (3rd Cir. 1986).

(5) Appellees are well aware of the position taken by The Third Circuit Court of Appeals and the criteria for the bases of the Court's decision regarding exhaustion. They are also very familiar with the details discussed above in Jorden.

(a) Del. DOJ Counsel for Appellees in the present case is also Counsel for the DEARNG in Karr v. Carper, No. 93-7410. In that case, where Plaintiff correctly filed his Complaint in Federal District Court without first appealing to the ABCMR for administrative remedy, Defendants took an approach exactly opposite that taken in the present case by contending incorrectly that it was inappropriate for

the District Court to render an opinion on the merits of the Karr case because Plaintiff had failed to exhaust his administrative remedies. Specifically asserting, again incorrectly, that Plaintiff should have sought review of his separation from the ABCMR. Karr v. Carper, No. 93-7410, March 31, 1993 Opinion, C.A. 88-466MMS, page 2.

(b) The District Court, in its March 31, 1993 Opinion, page 2, clearly explained The Third Circuit Court of Appeal's position on exhaustion, as discussed above at para. c. (1), and its near identical application in Karr as previously in Jorden. The Court's Opinion explained that, similar to Jorden losing his civilian technician job which was under State control, Karr was separated from an AGR tour of duty that was also under State, not Federal control; and because the ABCMR could not order the State to reinstate Karr

in the AGR program anymore than it could order the State to reinstate Jorden as a civilian technician, the potential for administrative remedy was found inadequate and, therefore, exhaustion was correctly not required in either Jorden or Karr and for identical reasons: because the overriding characteristic of the State control existed in each of those cases which is directly contrary to the present case.

(c) Conversely, therefore, if the circumstances and characteristics of the present case, above at para. c.(4), existed in Jorden and Karr, the result would have been the opposite; exhaustion would have been required, as it is in the present case, because, without the "State Control" characteristic involved, the potential would have existed in Jorden and Karr for a fully adequate Federal administrative remedy. In light of the Court decisions and writings discussed above, if Third Circuit law

regarding exhaustion is applied to the present case in a manner consistent with its application in Jorden and Karr, the Court's decision could only be that exhaustion was required in the present case. To decide otherwise would constitute an error of law totally inconsistent with the Court's established rationale on the subject and would therefore violate the uniformity of the Court's past decisions regarding exhaustion.

B. AGE DISCRIMINATION

3. The District Court, in its Memorandum Opinion issued May 5, 1993, stated on page 5 that: (a) Plaintiff has demonstrated that the Court initially committed an error of law in applying a 90 day statute of limitations; (b) Court agreed that the applicable statute of limitations should be two years after the cause of the action accrues, or three years if the violation was

willful; (c) Plaintiff has not demonstrated that the Court would have reached a different result had the Court used the two or three year statute of limitations; (d) The Court found that Plaintiff's age discrimination cause of action at the latest accrued on May 23, 1989; (e) Thus, even if the Court applied the three year statute of limitations, the cause of action would still be time barred.

(a) Appellant (Plaintiff) respectfully points to the Court's conclusions at 3. (c) and (e) above as errors of fact and apprehension which if corrected would cause the Court to not dismiss Appellant's age discrimination cause of action but rather, to hear and judge the claim on its merits.

(1) The Court has apparently overlooked the first "FACT" stated in the District Court's May 5, 1993 Memorandum Opinion at page 1 and also "CONCLUSION" C.(2) found in Appellant's Informal Brief at

page 6, and para. 5.B. at page 10.

(a) The apparently overlooked fact is that Plaintiff filed his Complaint on May 22, 1992 which, when coupled with the Court's finding at 3.(d) above, that Plaintiff's age discrimination cause of action accrued on May 23, 1989, proves that the filing was within the applicable three year statute of limitations for willful age discrimination and that the Court's conclusions at 3.(c) and (e) above are, therefore, errors of fact and apprehension.

4. In case it might have also been overlooked, "substantial evidence" that Appellees knew or suspected that their actions might violate the ADEA was provided initially in Appellant's Complaint, page 45, para. 92-94, and in his Reply Brief, pages 14, 15, para. 2.a., 2.b., 3.a., 3.b.,) which, clearly exceeds the threshold for such "substantial evidence" as established

in Olsen v. Southern Pacific and Coleman v. Jiffy June Farms as referenced in Reply Brief on pages 13 & 14, para. 1.a., b. and c.

III. CONCLUSION

FOR THESE REASONS, Richard M. Walsh asks that the decision of the Delaware District Court be reversed and that both parties be directed to confer immediately on a possible settlement at no cost to Appellees, as explained in Appellant's Informal Brief, pages 11-13, para. 7.; and, in the event the settlement effort would fail, to direct Appellee's to answer Appellant's Complaint so that the issues and facts may be properly heard and judged by the Court on their merits.

Respectfully Submitted by:

Dated: 12/2/93 (s) Richard M. Walsh

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